

E-Filed on 9/18/09

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS,
LLC,¹

USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED
FUND, LLC,²

USA SECURITIES, LLC,³
Debtors.

Affects:

- ☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR¹
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR²
Case No. BK-S-06-10729-LBR³

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**FIRST OMNIBUS OBJECTION OF
USACM TRUST TO PROOFS OF
CLAIM BASED UPON
INVESTMENT IN THE ARAPAHOE
LAND INVESTMENTS, LP LOAN**

Date of Hearing: October 19, 2009
Time of Hearing: 3:00 p.m.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disallowing the Proofs of Claim filed by individual investors ("Direct Lenders")

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 21, 2007.

1 against USA Commercial Mortgage Company (“USACM”) to the extent such claims are
2 based upon an investment in the Arapahoe Land Investments, LP Loan (the “Clear Creek
3 Loan”). This Objection is supported by the Court’s record and the Declaration of Edward
4 M. Burr in Support of Omnibus Objections to Proofs of Claim Based Upon the Investment
5 in the Clear Creek Loan filed with the Court today (the “Burr Decl.”).

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. BACKGROUND**

8 1. On April 13, 2006 (“Petition Date”), USA Commercial Mortgage Company
9 (“USACM”), USA Securities, LLC, USA Capital Realty Advisors, LLC, USA Capital
10 Diversified Trust Deed Fund, LLC, and USA Capital First Trust Deed Fund, LLC
11 (collectively, the “Debtors”), filed voluntary petitions for relief under chapter 11 of the
12 Bankruptcy Code. Debtors continued to operate their businesses, if any, as debtors-in-
13 possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtors’ post-
14 petition management of the Debtors was under the direction of Thomas J. Allison of
15 Mesirow Financial Interim Management, LLC (“Mesirow”), who served as the Chief
16 Restructuring Officer.

17 2. USACM is a Nevada corporation that, prior to the Petition Date, was in the
18 business of underwriting, originating, brokering, funding and servicing commercial loans
19 primarily secured by real estate, both on behalf of investors and for its own account.

20 3. That business included the solicitation of individual investors to purchase
21 fractional interest in loans that USACM originated and then serviced. These investors,
22 totaling approximately 3,600 as of the Petition Date, are referred to as “Direct Lenders” in
23 USACM’s bankruptcy case and in this Objection.

24 4. On September 14, 2006, the Court entered its Order Setting Deadline to File
25 Proofs of Claim and Proofs of Interest [Docket No. 1280] (the “Bar Date Order”). The
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1 Bar Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as
2 the deadline (“Bar Date”) for creditors to file proof of claims.

3 5. On September 25, 2006, Debtors served a copy of the Bar Date Order on
4 their service lists [Docket No. 1358]. All Creditors were served with a copy of the Bar
5 Date order as well [Docket No. 1358].

6 6. On November 6, 2006, a stipulation was filed and an order entered extending
7 the Bar Date for Direct Lenders only to file proofs of claim until January 13, 2007 [Docket
8 No. 1729].

9 7. On January 8, 2007, this Court entered its Order Confirming the “Debtors’
10 Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No.
11 2376] (the “Confirmation Order”).

12 8. As part of the Plan, USACM sold the servicing rights to most of the loans it
13 serviced to Compass Financial Partners, LLC, including the Clear Creek Loan. The sale to
14 Compass Financial Partners closed on February 16, 2007.

15 9. Under the Plan, the USACM Trust is the successor to USACM with respect
16 to standing to seek allowance and disallowance of Claims.

17 10. On information and belief, Silar Advisors foreclosed on its loan(s) to
18 Compass Financial Partners in September 2008 and alleges that it has become the
19 successor servicer to the Clear Creek Loan and the Direct Lenders thereto.

20 11. Under the Plan, unsecured claims of Direct Lenders against USACM are
21 classified in Class A-5. Allowed Unsecured Claims “shall receive a beneficial interest in
22 the USACM Trust, and on account of their Allowed Claim may receive a Pro Rata Share
23 of the assets of the USACM Trust after satisfaction of all Allowed unclassified Claims,
24 Allowed Class A-1, A-2, and A-3 Claims, and all post-Effective Date fees, costs, and
25 expenses of implementation of the USACM Plan for USACM and the USACM Trust.”
26

12. The USACM Trust exists as of the Effective Date of the Plan, which was March 12, 2007. Geoffrey L. Berman is the Trustee.

13. **Exhibit A** attached, lists Proofs of Claim filed by Direct Lenders that appear to be based entirely upon an investment in the Clear Creek Loan. (Burr Decl. ¶ 7.) **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant's address, the total amount of the claim and the total amount of the claim that appears to be related to an investment in the Clear Creek Loan based upon the information provided by the claimant. (Burr Decl. ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the Clear Creek Claims.

II. JURISDICTION

14. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

15. The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and Bankruptcy Rule 3007.

III. APPLICABLE AUTHORITY

16. Under the Bankruptcy Code, any Claim for which a proof of claim has been filed will be allowed unless a party in interest objects. If a party in interest objects to the proof of claim, the Court, after notice and hearing, shall determine the amount of the Claim and shall allow the Claim except to the extent that the Claim is "unenforceable against the debtor . . . under any . . . applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b).

17. The USACM Trust is entitled to object to proofs of claim under 11 U.S.C. § 502(a). This objection is timely under the confirmed Plan, as the deadline for such objections has been extended to October 7, 2009, by this Court's orders.

1 18. A properly filed proof of claim is presumed valid under Bankruptcy Rule
2 3001(f). However, once an objection to the proof of claim controverts the presumption,
3 the creditor ultimately bears the burden of persuasion as to the validity and amount of the
4 claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*,
5 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate
6 burden of proof as to the validity of a proof of claim “remains at all times upon the
7 claimant.” *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035,
8 1039 (9th Cir. 2000).

9 **IV. THE CLEAR CREEK LOAN DIRECT LENDERS**

10 19. On March 15, 2005, Arapahoe Land Investments, LP made and delivered to
11 various lenders, including the Direct Lenders identified in **Exhibit A**, a Promissory Note,
12 in an amount of \$2,150,000 (the “Note”). Through subsequent amendments, the loan
13 amount was increased to \$2,900,000.

14 20. The Loan was secured by a Deed of Trust, Assignment of Rents, Security
15 Agreement and Fixture Filing (“Deed of Trust”) on real property and improvements
16 thereon, as described in the Deed of Trust. The Deed of Trust was recorded on April 13,
17 2005 at Instrument Number 2005023121 in the Official Public Records of Real Property in
18 Galveston County, Texas.

19 21. According to the Mesirow Financial “Loan Summary” dated February 28,
20 2007, the loan was “performing.” Thus, when the servicing rights were transferred to
21 Compass Financial Partners the loan was performing.

22 22. Based on information provided by Silar as successor to Compass, since the
23 loan was transferred to Compass, the borrower paid off the remainder of the loan and the
24 Direct Lenders on the Clear Creek Loan were paid in full.

V. THE OBJECTIONS

23. The Direct Lenders fail to state a claim as the Direct Lenders have not been damaged. Upon information and belief, the Direct Lenders have been repaid in full, and consequently have no claim against the USACM estate.

24. To the extent the Direct Lenders have not been paid in full, the Direct Lenders still fail to state a claim as USACM has not breached the servicing contract. USACM was under no duty to foreclose on the property securing the Clear Creek Loan though a Notice of Default was sent to the Borrower and guarantors during the pendency of the USACM bankruptcy and prior to the sale of the servicing rights to Compass Financial Partners. To the extent the property's value dropped since USACM sold the servicing rights pursuant to the Plan of Reorganization, USACM is no longer a party to any servicing contract and consequently has no rights, duties, or obligations thereunder.

25. USACM did not guarantee the Direct Lenders' investment in the Clear Creek Loan. The Direct Lenders took a known risk by investing. Accordingly, USACM is not liable for the Borrower's default or any decrease in the value of the collateral caused by the downturn in the real estate market.

VI. CONCLUSION

The USACM Trust respectfully requests that the Court disallow the claims listed in **Exhibit A** based upon a Direct Lender investment in the Clear Creek Loan. The USACM Trust also requests such other and further relief as is just and proper.

Dated: September 18, 2009.

LEWIS AND ROCA LLP

By /s/ Marvin Ruth (#10979)

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John Hinderaker, AZ 18024 (*pro hac vice*)

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4 *Attorneys for the USACM Liquidating Trust*

5 Copy of the foregoing and pertinent
6 portion of Exhibit A mailed by first
7 class postage prepaid U.S. Mail on
8 September 18, 2009 to all parties listed
9 on Exhibit A attached.

10 LEWIS AND ROCA LLP

11 /s/ Marilyn Schoenike
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